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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1904.

No. 288.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY, OF SAVANNAH, GA.,
Plaintiff in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH.

In Error to the Supreme Court of Georgia.

Brief of William Garrard, for Defendant in Error.

PRESSES BRAID & HUTTON, SAVANNAH, GA.

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Supreme Court of the United States.

OCTOBER TERM—1904.

No. 238.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY, OF SAVANNAH, GEORGIA,
Plaintiff in Error,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
Defendant in Error.

In Error to the Supreme Court of Georgia.

BRIEF OF WILLIAM GARRARD, FOR THE DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, and other street railroad companies had been paying to the defendant in error, for several years prior to 1899, a specific or business tax of four hundred (400) dollars, as well as a specific tax

of twenty-five (25) dollars for each and every car used in the City of Savannah, per annum (Record 14).

In the Tax Ordinance of Savannah, adopted for the year 1899, and amended March 22, 1899, this was changed, and the business tax was graded, so that street railroad companies had to pay "for the privilege of doing business in the city, and for the use of the streets of the city," at the rate of $100 per mile or fraction of a mile of track used in said city, and, in addition, $25 for each car used in the city, (pp. 13 and 14).

This street railroad company controlled another similar company, and the joint mileage in use in the City was: nineteen (19) miles, (p. 47).

Plaintiff in error paid $25 for each car, for year 1899, voluntarily, and took out a badge for each car, (p. 14).

The business tax of $1,900 for 1899, plaintiff in error refused to pay. Accordingly, execution issued for the same on 22nd of July, 1899, as required by the Tax Ordinance, (p. 14), whereupon, an equitable petition was filed by this street railroad company, in the Superior Court of Chatham County, Georgia, seeking injunction against levy and sale under said execution, and a temporary restraining order was granted, August 19, 1899 (p. 11).

To this, the City filed its answers (pp. 12, 13, 14 and 15). Plaintiff filed two amendments (pp. 16 to 29). On hearing had, February 19, 1900, the trial judge held the tax a lawful one, and dissolving the restraining order, refused the injunction sought (p. 29).

Thereupon, the plaintiff in error carried the case by "swift writ of error" to the Supreme Court of Georgia, where it was argued March 21, 1900, and then, on motion of plaintiff in error, re-argued July 17, 1900, and decided November 26, 1900; the Supreme Court sustaining the Court below, as will be seen, by reference to the decision in 112th Ga., p. 164, wherein the opinion is delivered by the Chief Justice.

Thereupon, in regular course, the case came on for trial, and the court directed a verdict for the defendant, and judgment was entered accordingly, (p. 30).

Motion for new trial was made by plaintiff (p. 31), brief of evidence filed (pp. 32 to 48), and on August 10, 1901, new trial was refused (p. 48); bill of exceptions was filed (pp. 6, 7 and 8), and on April 2, 1902, the Supreme Court of Georgia rendered its decision, sustaining the Court below in refusing a new trial (pp. 49, 50 and 51), which case is reported in full, in 115th Ga., p. 137, and this decision of the Supreme Court of Georgia is alleged by plaintiff in error to be erroneous, on the grounds stated in the Assignment of Error (p. 5).

Counsel for defendant in error is indebted to his able predecessor in office, Hon. Samuel B. Adams, for copies of his briefs used in the several hearings, and this brief is largely compiled from them.

IT IS TO BE NOTED,

(a) No point is made as to the justice or amount of the tax complained of; objection being based entirely upon the proposition, that there is an absence of power in the defendant in error to lay any assessment or tax on a street railroad company, in the nature of a busine s or specific tax.

(b) The statement in defendant's verified answer, that "plaintiff is commonly known as a Street Railroad Company, and the bulk of its business and revenue is due to the use of the streets of the City of Savannah by its electric passenger cars," is nowhere controverted or denied, but, is admitted by plaintiff's president (p. 45).

(c) It is nowhere controverted or denied, that the statements in the second paragraph of the answer, are true, to the effect: that, prior to the adoption of this Tax Ordinance, plaintiff and other street railroad companies had been required to pay, and had paid, to the City a specific tax of four hundred (400) dollars per annum, and besides, a specific tax of $25 for each car used. [illegible]e present tax was graded, so it might not work [illegible]ti[illegible]e to a small company using but a

small part of the public streets, that on January 31, 1899, this plaintiff paid the car tax for 1899, voluntarily, and had of its own accord paid same for a number of years (p. 14).

If plaintiff's contention is sound, it has never been liable for the portion of the specific tax based on the number of cars used, nor for any tax at all to the City of Savannah, except property tax paid through the Comptroller General's office, and the proper pro rata assigned to the City.

(d) *It is admitted by plaintiff, that: "the execution issued for a specific tax, and this tax was among the specific taxes mentioned in the Tax Ordinance, referred to in the pleadings," (p. 47).*

(e) An exact copy of the original Tax Ordinance of December 28, 1898, and of the amendment of March 22, 1899, is set out in the second paragraph of the answer (p. 14), and in plaintiff's amendment (pp. 16, 17). The amendment of the Tax Ordinance makes more clear the intent of City Council, as to the original Ordinance, touching that part of the specific tax based on mileage, and is careful to preserve the other part, based on the number of cars.

This is important, to show that City Council retained the right to impose the car tax, which had been previously paid.

So, that the only change in the character of this legislation was, the substitution for a lump sum, which had been paid for years, of an assessment based upon mileage within the City limits.

(*f*) It is contended, by plaintiff in error, that the Central of Georgia Railway Company, a great commercial railroad, has a track on River and other streets, so as to deliver freight cars from a distance, to the wharves and other points (p. 43), and that plaintiff ought not to pay a business tax on its City mileage, because, as a witness "is informed and believes" (p. 33), no attempt was made to impose tax on such railway company for the privilege of using streets.

If this statement on information was any evidence of the fact, it was not material.

The Ordinance applies to *all* street railroads. If the City failed to collect such a tax from another street railroad (which is not claimed), this would not be excuse for plaintiff not paying; the remedy would be by mandamus. (86 Ga., p. 307). The Central of Georgia Railway Company, of course, does not come within the Ordinance, either in terms or spirit.

LAW POINTS.

I.

AS TO THE FIRST ASSIGNMENT OF ERROR (pp. 5, 6), WE SUBMIT, THAT IT IS UTTERLY UNTENABLE, UNDER THE LAW AND THE FACTS.

The allegation is, that the Tax Ordinance denies to plaintiff in error "the equal protection of the laws," in that:

(1) It is "an arbitrary classification by the taxing power"; and,

(2) It is "a discrimination against the said plaintiff, in that, it did not apply to other persons similarly situated, and using the streets under like condition."

WE REPLY:

(a) Under the local law, this Ordinance is valid and legal.

The legislative or municipal authorities may classify all subjects of taxation, exclusive of property, and may tax or exempt any or all such classes, with a uniform rate upon the whole of each class taxed.

Savannah vs. Weed, 84th Ga., 683.

The only requirement as to business taxes in the Georgia Constitution, is: *"All taxation shall be uniform upon the same class of subjects."*

Ibid, pp. 685, 686.

This is the law, generally.

Cooley on Taxation, 3rd Ed., Vol. 2d, p. 1100.

In Atlanta, by Charter, a person who pays an *ad valorem* tax on merchandise, cannot be required to pay more than $25 specific business tax, but City Council has right to classify.

In Keely vs. Atlanta, 69th Ga., 583, it was held, that under this charter, the City Council could classify a department store into several departments, and tax each as a separate business, and, further, that, the *"policy of the Ordinance"* is not for Courts to decide.

In Savannah vs. Crawford & Lovell, 75th Ga., 35, the Court notices the extremely full charter powers of Savannah, touching this class of taxation, sustains the right to increase a specific tax on a merchant who had already paid the same, and who claimed that his right to do business for the amount paid had become vested, and the Court used this language, p. 40: *"The claim is more strictly to an immunity or exemption from an equal and common burthen imposed upon other citizens, than to a vested right, and in such case,*

the party claiming the exemption, must produce the law exonerating him." (Italics ours).

In Goodwin vs. Savannah, 53rd Ga., 410, it was held, that "a tax levied by the Mayor and Council of Savannah on the business of a common carrier within the City, is not illegal or unconstitutional, because the tax is graduated according to the number of drays, carriages, wagons, etc., used in such business."

See, also, Home Insurance Co. vs. Augusta, 50th Ga., 530 (2); Southern Home Building & Loan Association vs. Stewart, Tax Collector, 109 Ga., p. 80, wherein, a tax of one dollar for each telephone station or box imposed by the General Tax Act of Georgia, is held to be an occupation or business tax, and not a tax on property, and so a tax of 2½ per cent. on gross receipts of express companies, and the Court holds further (5th head-note) *"Whether occupations shall be taxed, and if taxed, how they shall be classified, are questions referred by the Constitution to the General Assembly, but all such taxes, when levied, shall be uniform upon the same class of subjects";* (Italics ours); Weaver vs. The State, 89 Ga., 642, as to a tax on business of selling sewing machines, tax held not to discriminate, and to be legal and Constitutional; Davis vs. Macon, 64th Ga., 128.

IN SAVANNAH, THUNDERBOLT & ISLE OF HOPE RY. CO. VS. SAVANNAH, 112TH GA., 166 AND 168, THIS VERY TAX IS

HELD TO BE A PROPER BUSINESS TAX, AND LEGAL IN ALL RESPECTS.

(*b*) On the merits of the case, there was no error in the decision rendered by the Supreme Court of Georgia in this case in 112th Ga., p. 164, and 115th Ga., p. 137.

All persons, generally, natural and artificial, who live in Savannah, or do business therein, are subject to specific or business tax, under the broad powers of the City, to be found in Section 4847 of the Code of Georgia, for 1882. This section of said Code, referring to the powers of the Mayor and Aldermen of said City, is, as follows:

"Sec. 4847. TAXATION. They are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said city, and those who hold taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said city, and may enforce the payment of such assessments and taxes, in such manner as said mayor and aldermen may prescribe. Besides real and personal property, the said mayor and aldermen may tax capital invested in said city, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession,

faculty, trade or calling, dividends, bank, insurance, express and other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law or competent authority of the United States."

The Supreme Court of Georgia in a number of decisions where this clause of the charter of Savannah has been before it, has upheld it, as being as broad as possible to cover every kind of taxation. It was held by said Court, regarding this clause, in 112th Ga., p. 164: "This is about as broad a power, as the English language can express, to tax businesses and occupations."

In Charlton vs. Savannah, 36th Ga., 460, the Court held, that Dr. Charlton, as he had been licensed by the authority of the State to practice his profession in Savannah, could not be required by the city authorities, to take out a license as a condition precedent to his following his profession in the city, but, that the city could lawfully lay a business tax on his profession. See page 482.

In Burch vs. Savannah, 42nd Ga., 596, it was held, that a party who had paid the charges required of retail liquor dealers, and the per cent. on his gross sales, could also be required to pay the business tax, assessed against retail dealers generally.

In the case of Home Insurance Co. vs. Augusta, 50 Ga., 530, although the tax was called a "license tax," it was held notwithstanding to be a "business tax," and not a license, and the Court holds, that Augusta had a right to put this tax on the insurance company under the power in the charter to "make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, as may seem expedient, &c."

In Wright & Hill vs. Atlanta, 54th Ga., 645, it was held, that a business tax could be required of parties who had obtained license from the State to prosecute their respective callings. This was a tax upon the business of lawyers.

In Savannah vs. Hines, et al., 53rd Ga., 616, the imposition of a business tax on lawyers, by the City of Savannah was upheld, notwithstanding the fact, that they had license to practice law in Savannah from the State.

OUR CONTENTION IS, THAT THE POWER TO LAY THIS BUSINESS TAX IS COVERED BY THE CHARTER OF THE CITY, WHICH IS VERY BROAD AND COMPREHENSIVE, AS TO THE TAXING POWERS OF THE CITY OF SAVANNAH, AND, BEYOND ALL, THIS FULL POWER IS GRANTED BY THE ACT OF DECEM-

BER 18, 1894, AMENDING THE GENERAL RAILROAD LAW OF DECEMBER 17, 1892. SEE ACTS OF 1894, P. 69. THIS ACT HAS BEEN CODIFIED IN THE CODE OF GEORGIA, OF 1895, AND NOW APPEARS, AS SECTION 2180 OF SAID CODE, WHICH IS AS FOLLOWS:

"Sec. 2180. STREET-RAILROADS, HOW INCORPORATED. All the provisions of the preceding Divisions shall govern in the incorporation, control and management of suburban and street railroad companies, in so far, as the same are applicable and appropriate thereto. Any number of persons not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding Division, with this additional requirement, that they must in their petition specify what city, town or village, and in what streets thereof, they propose to construct and build said railroad: PROVIDED, that no street railroad incorporated under this Division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: AND PROVIDED FURTHER, that all such street railroad companies incorporated under this Division, shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: AND PROVIDED FURTHER,

only such of the powers and franchises that are conferred by said Division shall belong to said street railroad companies, as shall be necessary and appropriate thereof; and, in case any street railroad incorporated under this Division shall be partly located in an incorporated town or city, and partly located in the country, then the provisions of the preceding Division which apply to other railroads located in the country, shall apply to it, so far as that portion of its road is concerned."

It is admitted, that plaintiff in error was incorporated under said Act. (See Record, pp. 46 and 47).

The second "proviso" is broad and sweeping: "ALL SUCH STREET RAILROAD COMPANIES INCORPORATED UNDER THIS DIVISION SHALL BE SUBJECT TO ALL JUST AND REASONABLE RULES AND REGULATIONS BY THE CORPORATE AUTHORITIES, AND LIABLE FOR ALL ASSESSMENTS, AND OTHER LAWFUL BURDENS, THAT MAY BE IMPOSED UPON THEM FROM TIME TO TIME."

The words "assessments and burdens" were before this Court in Wells vs. Savannah, 181 U. S., pp. 540-1-2-3, and it was there held, that "assessments" and "taxes" were interchangeable terms.

In the Augusta case, in the Georgia Supreme Court, heretofore cited, on pages 539 and 540 of 50th Ga., the court answering the question, What is the meaning of the words "assessments on the inhabitants"? holds, that it includes a business tax on the corporation before that court, and, that a business tax could no more be excluded from the words used, than a property tax.

The first "proviso" in said Code, Sec. 2180, reads:

"PROVIDED, THAT NO STREET RAILROAD, INCORPORATED UNDER THIS DIVISION, SHALL BE CONSTRUCTED WITHIN THE LIMITS OF ANY INCORPORATED TOWN OR CITY, WITHOUT THE CONSENT OF THE CORPORATE AUTHORITIES."

The case stands, as if the plaintiff in error had specifically agreed, in consideration of the charter rights obtained by it under this Act of 1894, and under the consent given by the municipal authorities, that the road should be constructed within the limits of Savannah, that the municipal authorities of said City might govern and control it by *"just and reasonable rules and regulations,"* and, also, might lay upon it from time to time all taxes, property and specific, which these authorities might see fit to lay, as well as "other lawful burdens."

The plaintiff in error can take no comfort from the words "and other lawful burdens." They were not intended to restrict the broad scope of the previous words or subtract anything therefrom. By the use of these words, the Legislature meant to recognize that specific taxes and other taxes were authorized and made lawful, but, that there might be other lawful burdens, such as street improvements, paving assessments and the like.

In the case of Frankford & Philadelphia Passenger R. R. vs. Philadelphia, 58th Penna. St., 119, fifty dollars were charged and sustained for each car, under the law which authorized the city to provide the "proper regulation of omnibuses or vehicles in the nature thereof."

And see Ry. Co. vs. Philadelphia, 101st U. S., pp. 534 and 535, wherein this Court, substantially, holds, that the grant to a corporation to carry passengers in cars over the streets of a city does not involve exemption from liability to municipal regulations, no more than in the case of a natural person; that, when a corporation is authorized to conduct a specified business within a municipality, it is intended, that the business shall be conducted under the rules, restrictions and regulations, which govern others transacting the same business.

If the stockholders of the plaintiff were conducting a street railway business without a charter, they would

certainly not be exempt from a business tax, no more than the owners of omnibuses, drays and other vehicles; certainly, the mere fact of incorporation under such an act as that of 1894, subjecting them to the rules, regulations, assessments, burdens and taxes imposed by the city, cannot exempt them.

(c) The plaintiff admits this to be a specific tax, just as the other specific or business taxes set out in Tax Ordinance, (Record, p. 47).

Courts take judicial cognizance of the Ordinances of Savannah, just as they do of the laws of the State, and these Ordinances published by authority rank as evidence, just as the laws of the State similarly published.

Code of 1882, Sec. 4872, which section is as follows:

"Sec. 4872. ORDINANCES OF THE CITY, HOW EVIDENCED. All Ordinances, by-laws, rules and regulations of said city, published by authority of said mayor and aldermen, and promulgated as such by said authority, shall be evidence in all the Courts of this State to the same extent that laws of the State, as published by authority, shall be evidence of such laws; and when, in any case, an exemplification of any such Ordinance, by-law, rule or regulation, minute of council, or any paper of file in any of the departments of the government of said city may

be required, the same may be authenticated under the official signature of the mayor, or acting mayor, and the seal of said city."

In 107th Georgia, p. 432, the Surpreme Court of Georgia, referring to the Ordinances of Savannah, holds: "Of these Ordinances, this Court will take cognizance, equally with the acts of the Legislature."

The Tax Ordinance of 1899 is devoted, in large part, to the exaction of specific or business taxes.

See pamphlet Tax Ordinance 1899, pp. 6, *et seq.*

(d) THE PLAINTIFF IN ERROR, NOWHERE IN ITS PLEADINGS OR EVIDENCE, CHALLENGES THE AMOUNT OF JUSTICE OF THE TAX OR ITS MODE OF APPORTIONMENT.

(e) IT IS NOT DENIED OR CONTROVERTED, BY PLAINTIFF IN ERROR, THAT, FOR SEVERAL YEARS BEFORE 1899, IT HAD BEEN REQUIRED TO PAY AND HAD PAID, UNDER THE TAX ORDINANCES OF THE RESPECTIVE YEARS, A SPECIFIC OR BUSINESS TAX OF $400, AND HAD ALSO PAID $25 FOR EACH CAR USED, NOR DOES IT DENY, THAT FOR

THE YEAR 1899, IT VOLUNTARILY, ON JANUARY 31, 1899, PAID THE PORTION OF THIS BUSINESS TAX INCLUDED IN THE CHARGE PER CAR ($25).

(f) The classification in the Ordinance, including the Amendment, meets the requirements of the State law; it covers *all* street railroad companies, and exempts none of this class.

The classification is not *"arbitrary,"* unless it be in the sense that all designations and selections of classes to pay business taxes may be termed *"arbitrary."* Certainly, Savannah can force some classes to pay business or specific taxes, and exempt other classes, under the Georgia Constitution.

(g) The Ordinance, in laying this tax, in no wise "discriminates" against plaintiff in error; *all street railroad companies "similarly situated, and using the streets under like conditions,"* being required to pay according to mileage within the City, and according to number of cars used in the City.

"An occupation tax may be levied on a street railroad, for its use of the streets by tracks and cars."

Cooley on Taxation, 3rd Ed., Vol. 2nd, p. 1121.

(h) We submit, that this First Assignment of Error is unsupported by proofs or law.

The Ordinance clearly involves no *"arbitrary classification,"* nor does it *"discriminate,"* against plaintiff in error.

II.

THE SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR (P. 6) CAN BE CONSIDERED TOGETHER, AS THEY ALL RELATE TO THE ALLEGATION IN PLEADINGS OF PLAINTIFF IN ERROR, (2ND AMENDMENT, PP. 20 AND 21) TO THE EFFECT, THAT THE ORDINANCE AS AMENDED, IS UNCONSTITUTIONAL, NULL AND VOID, AS IMPAIRING THE OBLIGATION OF A CONTRACT.

(*a*) It seems, that this street railroad company petitioned the City Council of Savannah (Record, p. 42), showing, that, in addition to its own original lines, (including those of the City & Suburban Railway Company), (p. 47), it had acquired the lines of the Electric Railway Company of Savannah, and, that, for the purpose of operating its railway *"more economically and to better advantage,"* as well as to give

the public better service, it desired *"to readjust its several lines, etc.,"* and desired to be heard, so that a satisfactory arrangement could be arrived at.

This resulted in a report of a Committee, adopted by Council, specifying in detail, the lines so to be readjusted (pp. 35 to 42).

A careful reading of the agreement reached between the City Council of Savannah and the plaintiff in error, touching the readjustment of its lines, in connection with the said petition to the City Council, the basis of said agreement, *clearly shows, that this arrangement was made at the instance of the plaintiff in error, and for his own benefit.*

The plaintiff in error had its own lines, as well as those of the City & Suburban Railway Company and the lines of the Electric Railway Company of Savannah, and it desired to harmonize them, and blend them into one system, to do which, required the taking up of tracks in one place, the laying them down in another, the formation of different belts, involving the opening of certain streets so as to perfect said belts, and the City having the right of condemnation, it was provided in the agreement, that the City should condemn or acquire land for those streets, the street railroad company to pay for the same, in some instances wholly, in others, only in part. Not a dollar was paid to the City for the privilege of using a street already acquired. There is no expression in any part of the

contract, which suggests, that the municipal authorities ever contemplated the surrender of the right to tax, as now claimed.

The testimony of James H. Johnston, President of the Street Railroad Company, (pp. 43 and 44), shows, that whatever money was paid by the street railroad company for the acquirement of streets was done through the medium of the City, the City purchasing (with its power of condemnation back of it), and the street railroad company paying certain sums, so as to get its tracks through certain streets.

(b) The City of Savannah has never entered into any agreement with the plaintiff in error, which will be violated in terms or in spirit, by the imposition of this business tax.

The Mayor and Aldermen of the City of Savannah would have no right, in law, to make such a contract. The agreement seems to have been made in the year 1897, with two slight amendments in the summer of 1898, and there is certainly nothing therein, to prevent the City Council of Savannah in 1899, from laying this business tax upon street railroad companies.

No act of the Legislature of Georgia has been cited, which shows or even suggests, a purpose to confer such a power upon the City. The Constitution of 1877 prohibits any exemptions from taxation as to *"ad valorem"* taxes, except such as are designated in the

Constitution, and as to business tax, prevents any exemptions in any class which may be taxed.

(c) It was held by the Supreme Court of Georgia in 1899, that: "WHILST FORMERLY, THE STATE COULD, BY CONTRACT, RESTRICT ITSELF IN THE EXERCISE OF THE TAXING POWER, A MUNICIPAL CORPORATION HAD NO SUCH CAPACITY, IN RESPECT TO THE TAXING POWER COMMITTED TO IT."

> Augusta Factory vs. Augusta, 83rd Ga., 734, and the cases cited therein with approval (page 743).

The case of Mack vs. Jones, 21 N. H., 393, cited as aforesaid, is one where the property was conveyed by the City, and the City's deed contained an assurance of exemption from municipal taxation, and yet this contract was held to be void.

> See, also, Savannah vs. Crawford & Lovell, 75 Ga., pp. 35, 38, 39 and 40.
>
> Wells vs. Savannah, 107th Ga., pp. 2, 3 and 4.

In Wells vs. Savannah, 181 U. S., 539, 540, this Court holds, that the facts proven must show a contract of exemption expressed in terms, or else it must

be implied beyond all doubt; if any doubt, exemption does not exist.

In New Orleans City & Lake R. R. Co. vs. New Orleans, 143 U. S., 192, it was held, that an Ordinance of the City of New Orleans, imposing a license tax for the business of running horse or steam railroad for transportation of passengers, (the tax being twenty-five hundred dollars for the year 1887), does not impair the obligation of a contract made before the passage of the statute, by which the City sold to the railroad company for a large price ($630,000) the right-of-way and franchise, for twenty-five years, to run a railroad over certain streets and according to certain regulations, and the company agreed to pay the City, annually, a real estate tax, and the City bound itself not to grant during the same period a right-of-way to any other railroad company, over the same streets.

This Court held, on page 195, that, assuming, without deciding it, that the city of New Orleans was authorized to exempt this New Orleans Street railroad company from taxation, the contract between them affords no evidence of the intention to do so, and, on page 196, the Court states, that if this railroad company had desired or intended to have an exemption of any kind from taxation, it should have required such a provision to have been inserted in its charter. "THE CONSTITUTION OF THE UNITED

STATES DOES NOT PROFESS, IN ALL CASES, TO PROTECT PROPERTY FROM UNJUST AND OPPRESSIVE TAXATION BY THE STATES. THAT IS LEFT TO THE STATE CONSTITUTIONS AND STATE LAWS."

In City of Los Angeles vs. Southern Pacific Railroad Co., 64th Cal., 438, it is decided: "The grant by the City of Los Angeles to the defendant of the right to maintain and operate its road within the city limits, held, not to exempt it from the payment of the license tax (in this case $1,220) imposed upon steam railroads carrying on their business within the City." In the case between the same parties in 61 Cal., 59, the right to charge a license tax was sustained, under the general power which did not mention a railroad, particularly a commercial railroad, and the point was made by the attorney for the railroad company, that, the defendant was a corporation operating a public franchise, and having an express license to do what the license charged covered.

See, also, City of Wyandotte vs. Corrigan, 10th Pac. Reporter, 99, and F. C. & P. R. R. vs. the City of Columbia, 32nd S. E. Reporter, 408.

2. Dillon on Municipal corporations, 4th Ed., Sec. 789; Denver vs. Street R. R., 29th L. R. A., 610.

III.

THE FIFTH ASSIGNMENT OF ERROR (P. 6) IS TO THE EFFECT, THAT THE COURT ERRED IN REFUSING TO ENJOIN THE ENFORCEMENT OF SAID TAX ORDINANCE "NOTWITHSTANDING THE "OBJECTION, THAT THERE WAS NO "LAW IN THE STATE OF GEORGIA, "WHICH AUTHORIZED THE MUNICIPAL "GOVERNMENT OF A CITY TO LEVY "ANY LICENSE TAX, OR BUSINESS TAX "UPON A RAILROAD COMPANY, NOR, TO "COMPEL A RAILROAD COMPANY TO "PAY FOR THE PRIVILEGE OF DOING "BUSINESS, SAID ORDINANCE FOR THIS "REASON BEING AN ATTEMPT TO TAKE "THE PLAINTIFF'S PROPERTY, WITH-"OUT DUE PROCESS OF LAW, AND, "THEREBY, IN VIOLATION OF THE CON-"STITUTION OF THE UNITED STATES."

(*a*) This assignment of error is, manifestly, abortive, and, absolutely without legal virility.

By reference to the original petition of plaintiff in error in the trial court (Record, p. 10), it will be observed, in the fourth paragraph, that it is alleged:

"The said tax of nineteen hundred dollars upon petitioner's real estate is illegal, and contrary to law. It is assessed without authority of law. It is not assessed and levied according to law providing for the taxation of railroads by municipal authorities." And, again, in paragraph five, it is alleged: *"Notwithstanding the fact, that this exaction of nineteen hundred dollars is illegal, and without authority of law," etc.* (Italics ours).

By reference to the first amendment filed to the petition (p. 17), it will be observed, that petitioner alleges as follows: *"Your petitioner avers, that the Mayor and Aldermen of the City of Savannah on March 22, 1899, were without the power to pass the said amendment, by which, they undertook to transform specific property tax into a so-called license tax."* (Italics ours). And again, "THERE IS NO PROVISION OF LAW IN GEORGIA, WHATSOEVER, AUTHORIZING THE MUNICIPAL AUTHORITIES OF THIS STATE, TO COMPEL RAILROAD COMPANIES, OF ANY KIND, TO PAY FOR THE PRIVILEGE OF DOING BUSINESS IN THE CITY, OR FOR THE USE OF THE STREETS OF THE CITY," etc. (Italics ours).

By reference to the second amendment to the petition (p. 20), it will be seen, that, while the petitioner

alleges in the first paragraph, that this Ordinance as amended "is an authority exercised under the State of Georgia, and is repugnant to the Constitution of the United States, in that it impairs the obligation of the contract entered into between the said Mayor and Aldermen of the City of Savannah and your petitioner on November 4, 1897," etc., yet, in the second paragraph, of the same amendment, the petitioner alleges as follows:

"THIS ORDINANCE IS AN AUTHORITY EXERCISED UNDER THE STATE OF GEORGIA, AND THERE IS NO LAW IN THAT STATE, WHICH AUTHORIZES THE MUNICIPAL GOVERNMENT OF A CITY TO LEVY ANY LICENSE TAX OR BUSINESS TAX UPON A RAILROAD OF ANY KIND, NOR TO COMPEL A RAILROAD COMPANY OF ANY KIND TO PAY FOR THE PRIVILEGE OF DOING BUSINESS"; and, petitioner sets up in this second paragraph, allegations that this Ordinance is in the teeth of the Fourteenth amendment, being an attempt to deprive petitioner of its property "without due process of law."

(b) THE PREMISES CONSIDERED, THE LOGICAL CONCLUSION IS IRRESISTIBLE. THAT IS TO SAY, THE PETI-

TIONER HAS ALLEGED ITSELF OUT OF COURT, IN THAT, IT RAISES NO FEDERAL QUESTION, AND COMPLAINS OF NO REAL VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, EITHER AS TO IMPAIRING THE OBLIGATION OF A CONTRACT, OR AS TO ANY INFRACTION OF THE FOURTEENTH AMENDMENT.

"The Mayor and Aldermen of the City of Savannah," is a municipal corporation, the creature of the State law. It gets its powers from the State law.

IF, AS ALLEGED BY PETITIONER, THERE IS NO STATE LAW IN GEORGIA, AUTHORIZING THE ADOPTION OF THE ORDINANCE IN QUESTION, BY THE MUNICIPALITY OF SAVANNAH, THEN, THERE IS IN THIS CASE NO FEDERAL QUESTION AT ALL, AND THIS COURT IS WITHOUT JURISDICTION.

A municipal ordinance passed *ultra vires* is not a law of the State, and an act performed thereunder is not an act of the State.

Hamilton vs. Hamilton, 146 U. S., 258-266.

An ordinance, adopted contrary to the law of the State (as here alleged) is not an act of the State.

Barney vs. City of New York, 193 U. S., 430.

"It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does, really and substantially, involve a dispute or controversy as to a right, which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

W. U. Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., p. 239.

It is true, that there are allegations scattered through the petition and the amendments, that this ordinance as amended violates "the obligation of a contract," and that it seeks to deprive petitioner or property "without due process of law," but, these are mere conclusions of the pleader, and are not controlling.

They must be taken along with the express allegations in the petition and amendments, *that no law of the State of Georgia exists, which authorizes the adoption of such an ordinance,* and that, therefore, the authority of the Mayor and Aldermen of the City of Savannah was a pretended and void authority under the Georgia law, and by the latter allegations the petitioner kills its own case, so far as its right is con-

cerned, to have the judgment of the Supreme Court of Georgia reviewed and passed upon by this court.

This case is very similar, in this regard, to one tried in the Circuit Court of Appeals for the Fifth Circuit, being an appeal by the Mayor and Aldermen of the City of Savannah, et al., against Holst, et al., decided on October 10, 1904, where the Court of Appeals held, upon the decisions of the Supreme Court of the United States cited above, that there was no Federal question in the case, and therefore the Court took jurisdiction, and reversed the decision of the Circuit Court.

132nd Fed. Reporter, 901.

The plaintiff in error may claim that this Ordinance was unauthorized by law, but, its remedy was in the State Courts, not here.

In Walston vs. Nevin, 128th U. S., 582, this Court holds: "The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field, in Mobile vs. Kimball, (102 U. S., 691), 'This Court is not the harbor, in which the people of a State or County can find a refuge from ill-advised, unequal and oppressive State legislation.' "

IV.

IT IS RESPECTFULLY SUBMITTED, THAT NO FEDERAL QUESTION IS HEREIN INVOLVED, AND THAT THE JUDGMENT OF THE SUPREME COURT OF GEORGIA SHOULD BE AFFIRMED.

WILLIAM GARRARD,
For the Defendant in Error.